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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 571

GRAHAM HARLEY,

Petitioner,

vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court for the Eastern District of Wisconsin,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October Term, 1962

No.

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HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court for the Eastern District of Wisconsin,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Graham Harley, Petitioner herein, prays that a Writ of Certiorari be issued to review the order of the Circuit Court of Appeals for the Seventh Circuit denying petitioner's petition for Writ of Mandamus to vacate and set aside order entered by the United States District Court for the Eastern District of Wisconsin on July 25, 1962 adjudging transfer of the action, No. 61-C-147, in which the petitioner, Graham Harley, is plaintiff and Louisville and Nashville Railroad Company is defendant, from the United States District Court for the Eastern District of Wisconsin to the United States District Court for the

Northern District of Georgia in the pending action for the recovery of damages instituted by petitioner against said railroad company. The motion for transfer was made by said Louisville and Nashville Railroad Company under Section 1404(a), Title 28 U. S. C., and was opposed by petitioner.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit of August 12, 1962, was entered without a hearing and is copied in Appendix A (post p. 8).

The opinion and order made and filed on July 25, 1962 in the United States District Court for the Eastern District of Wisconsin, Honorable Robert E. Tehan, District Judge, Presiding, is copied in Appendix B (post p. 9).

QUESTIONS PRESENTED FOR REVIEW

Was a sufficient showing made by the Louisville and Nashville Railroad Company to justify the order of July 25, 1962 entered in the District Court of the United States for the Eastern District of Wisconsin, which order the United States Court of Appeals for the Seventh Circuit refused to vacate and set aside by its order of August 12, 1962 on petitioner's petition to it for writ of mandamus?

STATUTE INVOLVED

Section 1404(a), Title 28, U.S.C. provides:

> "For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

JURISDICTION

The order of the Honorable Robert E. Tehan, judge of the United States District Court for the Eastern District of Wisconsin, was entered on July 25, 1962 and the order of the United States Court of Appeals for the Seventh Circuit was made and entered on August 13, 1962.

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C., Section 1254(1).

STATEMENT OF THE CASE

The petitioner, Graham Harley, a Wisconsin citizen, as plaintiff brought suit in the Circuit Court of Milwaukee County, Wisconsin, against the defendant, Louisville and Nashville Railroad Company, a foreign corporation, to recover $30,000.00 damages, allegedly sustained by him in the state of Georgia as the result of the negligence of the defendant, Louisville and Nashville Railroad Company, in the operation of its train on which he was a passenger. The action was removed from the Circuit Court of Milwaukee County, Wisconsin, to the United States District Court for the Eastern District of Wisconsin and after the filing of its answer, the defendant Louisville and Nashville Railroad Company, moved for transfer of the action from the United States District Court for the Eastern District of Wisconsin to the United States District Court for the Northern District of Georgia. The motion for transfer was opposed by petitioner who filed in that behalf the affidavit of Sydney M. Eisenberg, one of his attorneys, and, also, his motion that the motion of the Louisville and Nashville Railroad Company be dismissed on the ground, among others, that the change of venue sought is not necessary for the conven-

ience of the parties and witnesses and is not in the interests of justice.

The District Judge filed its opinion and order dated July 25, 1962, of which a copy is annexed, Appendix B, (post p. 9). The order of the Circuit Court of Appeals for the Seventh Circuit, dated August 13, 1962 denied review thereof.

ARGUMENT

The showing made by the Louisville and Nashville Railroad Company in support of its motion for transfer is set forth in the two affidavits of one of its Milwaukee attorneys, which contained a list of nine alleged witnesses and employees without more. Such hearsay showing does not state any facts material to or connected with the cause of action. Indeed, nothing whatsoever appears in the record concerning any knowledge of facts, if any, possessed by the nine witnesses, individually or collectively. Therefore, no basis whatever existed for the motion and the same should have been denied.

The District Court in this connection ventured the statement that the showings of both the plaintiff and defendant were "sparse", overlooking the fact that on material points the defendant made no showing whatsoever. The showing made by the defendant was inadequate, because it purposely made no showing of material facts whatsoever. The Court, however, indulged the presumption that the cost of obtaining witnesses would be less if the trial were held in Georgia. Certainly, in no respect or to any degree did the defendant make any showing having any force or validity.

The burden of proof is on the defendant to make the requisite showing and make out a strong case for a transfer.

It was so held in *Ford Motor Company v. Ryan*, 2 Cir., 182 F. 2d 329, 330, cert. den. 340 U. S. 851:

> "We think that by Sec. 1040(a) Congress did not alter the standards theretofore embodied in the doctrine of *forum non conveniens*, despite the fact that that section is applicable to types of actions to which the doctrine did not previously apply. So we read Ex Parte Collett, 327 U. S. 55, 69 S. Ct. 944, 949, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. vs. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 838, 843, still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' Those words, we interpret to mean (a) that the defendant has the burden of making out a strong case for a transfer and (b) that the plaintiff's privilege conferred by statute, of choosing a forum he selected is a factor to be considered against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'."

The following authorities support petitioner's contentions:

General Portland Cement Co. v. Perry, (CA-7), 204 F. 2d 316, 319, 320.

Chicago, Rock Island & Pacific Rd. Co. v. High Breeding Co., (CA-10), 232 F. 2d 584, 587, 588.

Jenkins v. Wilson Freight Forwarding Co., (DC NY), 104 F. Supp. 422, 424.

Grubs v. Consolidated Freight Ways, Inc., (D.C. Montana), 189 F. Supp. 404, 409.

In addition, the affidavits submitted by the defendant made by its counsel, while fatally deficient as pointed out, are based on hearsay, and, therefore, must be disregarded.

It is respectfully prayed by petitioner that a writ of certiorari directed herein to the United States Court of Appeals for the Seventh Circuit and that in due course the issues involved be ruled upon by this Honorable Court.

Respectfully submitted,

SIDNEY M. EISENBERG
HERBERT R. MANGER
Attorneys for Petitioner,
Graham Harley.

Post Office Address:
1131 W. State St.
Milwaukee 3, Wisconsin

CERTIFICATE

As one of the attorneys for Graham Harley, petitioner above named, I do hereby certify that a printed copy of the foregoing, together with the appendix, have been served on the Honorable Robert E. Tehan, Judge of the United States District Court for the Eastern District of Wisconsin, on Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, on Wickham, Borgelt, Skogstad and Powell, Attorneys for the Louisville and Nashville Railroad Company, and on Solicitor General, Department of Justice, Washington 25, D.C. by placing copies of same in the United States mail, directed to them at their respective offices, postage prepaid.

Dated, Milwaukee, Wisconsin, this 26 day of October, 1962.

Herbert R. Manger,
Attorney for Petitioner.

APPENDIX A
ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. DATED AUGUST 13, 1962.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Monday, August 13, 1962
Before
Hon. ELMER J. SCHNACKENBERG, Circuit Judge

GRAHAM HARLEY,
Petitioner,

No. 13847
vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court for the Eastern District of Wisconsin,
Respondent.

} Original Petition for Mandamus.

This matter comes before the Court on the petition of Graham Harley that a writ of mandamus issue out of this Court commanding the respondent to vacate and set aside an order entered by the United States District Court for the Eastern District of Wisconsin on July 25, 1962, and for other relief, filed in this Court on August 10, 1962.

On consideration whereof, IT IS HEREBY ORDERED that the aforesaid petition of Graham Harley for writ of mandamus and other relief be, and the same is hereby, DENIED, pursuant to Rule 19 of the Rules of this Court.

(Seal)
A True Copy:
Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN DATED JULY 25, 1962.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GRAHAM HARLEY,

Plaintiff,

vs. No. 61-C-147

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a foreign corporation,

Defendant.

OPINION AND ORDER CHANGING VENUE

In this action which was removed to this court from the Circuit Court of Milwaukee County, Wisconsin, the plaintiff, Graham Harley, a Wisconsin citizen, seeks to recover $30,000 damages from the defendant, Louisville and Nashville Railroad Company, a Kentucky corporation, for injuries allegedly sustained by him in the State of Georgia as a result of the negligence of the defendant in maintaining and operating a train on which he was a passenger. After filing its answer, the defendant moved for a transfer of this action from this court to the United States District Court for the Northern District of Georgia where, concededly, it might have been brought.

As we stated in Wyandotte Transportation Company v. Great Lakes Towing Company, 1961, 196 F. Supp. 494, the tests to be applied in determining whether a motion for change of venue pursuant to §1404(a), Title

28, U. S. C. should be granted are (1) the convenience of parties, (2) the convenience of witnesses, and (3) the interest of justice, and in applying the latter test the court is to consider the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of a view of the premises, and the state of the court calendars. While the facts presented by the parties as shown in the pleadings and in the affidavits of the defendant in support of its motion for change of venue and the plaintiff in support of his motion to dismiss that motion are sparse, it is our belief that the defendant has shown its entitlement to the relief requested.

With respect to the first test, the balance of convenience weighs heavily in favor of the plaintiff, since he is a Wisconsin resident whose convenience would be better served by trial in this district while the defendant maintains its home offices not in the Northern District of Georgia but in Louisville, Kentucky. With respect to the second test, however, it appears that all of the defendant's witnesses, being nine in number, reside in Georgia, Tennessee and Kentucky, and that a trial in the Northern District of Georgia would be far more convenient to them than a trial here. We have no way of weighing against this demonstrated convenience to the defendant's witnesses of a trial in Georgia the convenience to the plaintiff's witnesses of trial here, since the plaintiff's counsel, in his affidavit, has stated only that an unspecified number of unidentified persons who are Wisconsin residents, including two treating physicians, will be called by the plaintiff at the trial.

It further appears that since the events giving rise to the plaintiff's alleged injuries occurred in Georgia a view

of the premises would be more readily had were trial held in that state, that the cost of obtaining the attendance of the only identified witnesses at a trial would be less if the trial were held in Georgia, and that seven of the defendant's witnesses could be reached by process in Georgia. The Annual Report of the Administrative Office of the United States Courts for the fiscal year 1961 reveals that the running time for cases which go to trial is less in the Northern District of Georgia than in this district.

In our opinion the convenience of witnesses and the interest of justice would be better served by a transfer of this action to the Northern District of Georgia. The motion of the defendant for such transfer will therefore be granted and the motion of the plaintiff to dismiss said motion will be denied.

For the above and foregoing reasons,

IT IS ORDERED: That

1. The motion of the defendant Louisville and Nashville Railroad Company for a transfer of this action from this court to the United States District Court for the Northern District of Georgia be and the same is hereby granted.

2. The motion of the plaintiff Graham Harley to dismiss the defendant's motion for change of venue be and the same is hereby denied.

Dated, Milwaukee, Wisconsin, this 25th day of July, 1962.

ROBERT E. TEHAN
U. S District Judge

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IN THE

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October Term, 1962

No. 571

GRAHAM HARLEY,

Petitioner,

vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court
for the Eastern District of Wisconsin,

Respondent.

BRIEF AMICUS CURIAE OF THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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Attorneys for Louisville and
Nashville Railroad Company

GERALD J. KAHN
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IN THE

SUPREME COURT OF THE UNITED STATES

GRAHAM HARLEY, *Petitioner.*

vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court
for the Eastern District of Wisconsin, *Respondent.*

NOTICE

Please take Notice that upon the attached affidavit and upon all the pleadings, proceedings and papers heretofore had, the Louisville and Nashville Railroad Company, by its counsel, will move the Supreme Court of the United States, at its regular term thereof, to be held at the Capitol in the City of Washington, District of Columbia, commencing on the first Monday in October 1962 at the opening of Court on that day or as soon thereafter as counsel can be heard, for leave to file a brief amicus curiae in accordance with the attached motion.

Dated at Milwaukee, Wisconsin, this 7th day of December, 1962.

WICKHAM, BORGELT,
SKOGSTAD & POWELL

By: John R. Hoaglund, Jr.

TO: Sidney M. Eisenberg
Herbert R. Manger
1431 West State Street
Milwaukee 3, Wisconsin
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

GRAHAM HARLEY

Petitioner,

vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court
for the Eastern District of Wisconsin,

Respondent.

MOTION

Now comes the Louisville and Nashville Railroad Company, by its attorneys, Wickham, Borgelt, Skogstad & Powell, by Gerald J. Kahn of counsel, and upon the following affidavit and upon the pleadings and proceedings heretofore had, moves that the Court grant the Louisville and Nashville Railroad Company leave to file a brief amicus curiae in the above entitled matter.

WICKHAM, BORGELT,
SKOGSTAD & POWELL
Attorneys for Louisville and
Nashville Railroad Company

Gerald J. Kahn
710 North Plankinton Avenue
Milwaukee 3, Wisconsin
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

GRAHAM HARLEY,

Petitioner,

vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court
for the Eastern District of Wisconsin,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF WISCONSIN)
MILWAUKEE COUNTY) ss

John R. Hoaglund, Jr., being first duly sworn on oath deposes and says:

1. That he is one of the attorneys for the Louisville and Nashville Railroad Company, the defendant in an action brought by the petitioner, Graham Harley, as plaintiff, in the United States District Court for the Eastern District of Wisconsin; that said action, No. 61-C-147 was, by order of the respondent, the Honorable Robert E. Tehan, District Judge, transferred to the United States District Court for the Northern District of Georgia, following a hearing on the Louisville and Nashville Railroad Company's motion for such transfer.

2. That affiant is informed and believes that the respondent herein does not intend to file a brief, or have a brief filed on his behalf by the Office of the Solicitor General of the United States, in opposition to the Petition for Writ of Certiorari; that said respondent has given his consent to the Louisville and Nashville Railroad Company to file a brief amicus curiae with the Court in opposition to said Petition for Writ of Certiorari.

3. That the attorneys for the petitioner have withheld their consent to the filing of said brief amicus curiae by the Louisville and Nashville Railroad Company.

4. That the interest of the Louisville and Nashville Railroad Company will be directly affected by the Court's decision in this matter; that further, the interest of justice will best be served by the presentation of authorities and arguments favoring the respondent's position on the question presented for review.

Dated at Milwaukee, Wisconsin, this 7th day of December, 1962.

John R. Hoaglund, Jr.

Subscribed and sworn to before me
this 7th day of December, 1962.

Eleanor L. Schultz [SEAL]
Notary Public, State of Wisconsin

My Commission Expires: September 27, 1964

QUESTION PRESENTED FOR REVIEW

Was the order of July 25, 1960, entered by the District Court of the United States for the Eastern District of Wisconsin, granting a change of venue from the Eastern District of Wisconsin to the Northern District of Georgia, which order the United States Court of Appeals for the Seventh Circuit refused to vacate and set aside by its order of August 12, 1962, denying petitioner's petition for Writ of Mandamus, an abuse of judicial discretion?

STATEMENT OF THE CASE

The Louisville and Nashville Railroad Company accepts the statement of the case as presented by the petitioner, with the exception of the following:

1. The Louisville and Nashville Railroad Company filed its notice of petition for the transfer before the filing of its answer.

2. An affidavit was filed by the attorneys for the Louisville and Nashville Railroad Company in support of the motion for transfer, a fact which is not noted in the petitioner's statement of the case.

ARGUMENT

Rule 19 of the Revised Rules of the United States Supreme Court provides:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Subsection (b) of the above paragraph outlines some of the relevant reasons for which the Court will grant a review on certiorari, among which are the following:

(1) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals or of the United States Supreme Court;

(2) Where a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

Petitioner concedes that this action "might have been brought" in the United States District Court for the

Northern District of Georgia. 28 U.S.C. §1404(a) provides that the district judge may, in his discretion, transfer any civil action to another district where it might have been brought: *General Casualty Company v. Grubb*, 253 F. 2d 51 (7th Cir., 1958), *cert. denied*, 357 U.S. 907, 78 Sup. Ct. 1152, L. Ed. 2d 1157 (1958); *General Portland Cement Company v. Perry*, 204 F. 2d 316 (7th Cir., 1953).

Petitioner's argument is based almost entirely upon the decision in *Ford Motor Company v. Ryan*, 182 F. 2d 329, 330, (2d Cir., 1950), *cert. denied*, 340 U.S. 851; in which the Court of Appeals placed upon the defendant the burden of making a strong case for a transfer, noting that the plaintiff's privilege conferred by statute, of choosing a forum, is one factor to be considered against the "convenience of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'".

The Louisville and Nashville Railroad Company submits that Judge Tehan's opinion reflects that the Louisville and Nashville Railroad Company met the burden of proof incumbent upon it, and that the burden has now been placed upon the petitioner herein to establish that the respondent's order was clearly an abuse of discretion. *Higgins v. Carr Bros. Company*, 317 U.S. 572, 63 Sup. Ct. 337, 87 L. Ed. 468 (1943).

As was stated by Judge Simons in *Nicol v. Koscinski*, 188 F. 2d 537 (6th Cir. 1951) at Page 538:

> Determination as to the greater convenience or inconvenience must rest within the sound judicial discretion of the district judge to whom the petition for change of venue is addressed, and his decision should not be set aside unless there is apparent an abuse of discretion. This is so whether we accept

> the view of Judge Frank in Ford Motor Company v. Ryan, 2 Cir., 182 F. 2d 329, 331, that the judge must guess and that we should accept his guess unless it is "too wild", or whether we take the more conventional approach to the problem by Judge Learned Hand in the same case, who felt that to set aside an order the balance of convenience must be strong enough to declare a finding of the district judge "clearly erroneous".

And the Court of Appeals for the Seventh Circuit in *General Casualty Company v. Grubb, supra,* noted that an appellate court in reviewing a District Judge's exercise of discretion in balancing the conveniences must be careful to avoid substituting its discretion for the District Judge's.

The question here presented to the Court is not novel, the Court having previously considered the problem in *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 Sup. Ct. 544, 99 L. Ed. 789 (1955). In that case, the Court reviewed the common law doctrine of *forum non conveniens* and the effect of Section 1404(a) upon that doctrine. The majority opinion noted that the old doctrine of *forum non conveniens* involved the possibility of dismissal of a case because of the inappropriateness and inconvenience of the forum chosen by the plaintiff, whereas Section 1404(a) now provides merely for transfer rather than dismissal, thus alleviating the harsh results of a finding of inconvenience after the running of a statute of limitations. The Court in the *Norwood Case,* in holding that the judgment of the District Court was correct in ordering the requested transfer, said (at Page 32):

> When Congress adopted Sec. 1404(a), it intended to do more than just codify the existing law on forum non conveniens. As this Court said in Ex Parte Collett, 337 U.S. 55-61, Congress, in writing Sec.

> 1404(a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in Sec. 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon *a lesser showing of inconvenience*. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that *the discretion to be exercised is broader*. [Italics added]

As was pointed out in *United States v. American Linen Supply Co.*, 134 F. Supp. 21 (E.D. Wis. 1955), Section 1404(a) sets out three tests to be applied in deciding the motion for transfer of a cause, the first being the convenience of the parties; the second being the convenience of witnesses; and the third being the interests of justice. The third test embodies consideration of:

> The relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 Sup. Ct. 839, 843 91 L. Ed. 1055. *Nicol v. Koscinski, supra. Heller & Company v. Perry*, 201 F. 2d 525 (7th Cir. 1953).

A review of the respondent Judge's opinion illustrates that all of the above mentioned factors were taken into account in arriving at his decision. The Judge concluded the obvious, that the trial would be far more convenient

and less expensive to the defendant railroad company if it were tried in Georgia rather than in Wisconsin. The opinion noted that the defendant's witnesses, being nine in number, reside in Georgia, Tennessee and Kentucky, whereas the only specified person who is a Wisconsin resident and who would testify on behalf of the plaintiff, is the plaintiff himself. There was no showing by the plaintiff that a transfer of the case would necessarily result in the plaintiff's being unable to continue in the prosecution of the law suit because of financial or physical hardship, factors which were considered in *General Portland Cement Company v. Perry, supra;* and *Grubbs v. Consolidated Freight Ways, Inc.*, 189 F. Supp. 404 (D.C. Mont. 1960). Respondent's opinion also pointed out that the calendar in the Georgia district was less crowded than in Wisconsin, a relevant factor taken into account in several of the cited decisions.

The Louisville and Nashville Railroad Company further submits that the five cases cited in support of petitioner's contentions do not clearly illustrate an abuse of discretion in this instance. The cases are distinguishable on their facts, one involving a petition for transfer to a district court only "several minutes distant" from the court selected by the plaintiff, *Jenkins v. Wilson Freight Forwarding Company*, 104 F. Supp. 422 (D.C. N.Y. 1952); and another being a request for a transfer to a court where neither of the parties lived, two of the key witnesses residing in the district in which plaintiff brought his suit. *Grubbs v. Consolidated Freight Ways, Inc., supra.* The remaining cases merely illustrate that the lower court did not abuse its discretion in refusing to grant a transfer.

Cases which illustrate proper use of discretion in allowing transfers and which would support Judge Tehan's decision are:

Nicol v. Koscinski, supra.

Heller & Company v. Perry, supra.

Petitioner's brief attacks the affidavit submitted by the Louisville and Nashville Railroad Company as being hearsay and therefore of no probative value. It is sufficient, however, to point out that affidavits of counsel were the basis of the decisions in cases cited by the petitioner and were indeed called for by the courts in those decisions. The affidavit in support of the Louisville and Nashville Railroad Company's motion conformed in all respects to those in the cases cited.

CONCLUSION

On the basis of the foregoing authorities the Louisville and Nashville Railroad Company submits that the petitioner has failed to show special and important reasons for the granting of a writ of certiorari. Petitioner has failed to show that Judge Tehan's order of August 10, 1962, was "clearly erroneous", that it was in direct conflict with decisions of other Courts of Appeals or of the United States Supreme Court, or that the order constituted a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision. The respondent clearly considered the established tests in granting the order for change of venue, and his decision was a proper exercise of the broad discretion granted him by Section 1404(a) and the decision in *Norwood v. Kirkpatrick,*

supra. The Louisville and Nashville Railroad Company therefore respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

WICKHAM, BORGELT,
SKOGSTAD & POWELL
Attorneys for Louisville and
Nashville Railroad Company

Gerald J. Kahn
710 North Plankinton Avenue
Milwaukee 3, Wisconsin
Of Counsel

CERTIFICATE

As one of the attorneys for the Louisville and Nashville Railroad Company, I do hereby certify that a printed copy of the foregoing brief amicus curiae has been served upon the Honorable Robert E. Tehan, Judge of the United States District Court for the Eastern District of Wisconsin, on Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, on Sidney M. Eisenberg and Herbert R. Manger, attorneys for the petitioner, Graham Harley, and on the Solicitor General, Department of Justice, Washington 25, D. C. by placing copies of same in the United States mail, directed to them at their respective offices, postage prepaid.

Dated, Milwaukee, Wisconsin, this 10th day of December, 1962.

WICKHAM, BORGELT,
SKOGSTAD & POWELL

BY: John R. Hoaglund, Jr.
Attorneys for Louisville and
Nashville Railroad Company

GERALD J. KAHN
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